

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In re

Amendment of § 73.202(b) of the Rules,
Table of Allotments, FM Broadcast Stations
(LLANO AND MARBLE FALLS, TEXAS)

MM Docket No. 95-49
RM-8858
8558

To: The Chief, Allocations Branch,
Mass Media Bureau

OPPOSITION TO MOTION FOR RESOLUTION OF RULE MAKING PROCEEDINGS

Maxagrid Broadcasting Corporation, licensee of station KBAE(FM), Channel 285C3, Marble Falls, Texas, opposes, at least in part, Tichenor License Corporation's "Motion for Resolution of Rule Making Proceedings." While Maxagrid itself desires final closure of MM Docket No. 95-49, that closure must be without procedural or substantive error. The course of action Tichenor urges would fatally taint the proceeding with precisely such error. Therefore, Maxagrid must oppose Tichenor's Motion, and the Commission must reject the course of action Tichenor proposes.

I. BACKGROUND

1. Maxagrid initiated this proceeding in November 1994 by petitioning for the relicensing of Maxagrid's station KBAE (then KLKM) from Llano, Texas, to Marble Falls, Texas. Roy E. Henderson, Tichenor's predecessor-in-interest with respect to station KLTO(FM), Rosenberg, Texas, filed a fatally defective Counterproposal in response to the

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resulting Notice of Proposed Rule Making (NPRM). Mr. Henderson later sought to substitute his original Counterproposal with a Joint Counterproposal by himself and Tichenor. The Johnny-Come-Lately Joint Counterproposal sought the relicensing to Missouri City, Texas, and upgrading to Class C3 status, of Mr. Henderson's KLTO, and the relicensing to Menard, Texas, and upgrading to Class C2 status, of Tichenor's station KLTP.

2. The Commission's Report and Order, 62 Fed. Reg. 31008 (June 6, 1997), rightly deemed Mr. Henderson's opening gambit in this proceeding as fatally flawed and unacceptable, and dismissed it. The Report and Order also rejected the Johnny-Come-Lately Joint Counterproposal as fatally flawed in its own right. And most importantly, in furtherance of § 307(b) of the Communications Act, the Report and Order granted Maxagrid's request and relicensed KBAE to Marble Falls. So as not to deprive Llano of local service, the Report and Order also allotted Channel 242A to that community and established a filing window therefor.

3. Mr. Henderson and Tichenor then sought reconsideration of the Report and Order. They also sought a stay of the filing window for Channel 242A at Llano. The Commission never acted on the stay request, and that request has long since become moot, because during the window three applicants filed for the channel: Maxagrid, Elgin FM Limited Partnership, and BK Radio. As Tichenor's Motion relates, Mr. Henderson has sold KLTO to Tichenor. His and Tichenor's Petition for Reconsideration does remain pending, however.

4. Elgin FM has filed a Petition for Rule Making requesting the allotment of two additional Class A channels (275A and 293A) to Llano, pursuant to Albion, Nebraska, 10 FCC Rcd 11927 (1995), so as to resolve the mutual exclusivity between the three Channel 242A

applications. Elgin FM suggests assigning Channel 293A to itself, Channel 275A to BK Radio, and Channel 242A to Maxagrid. To Maxagrid's knowledge, the Agency has not issued a Notice of Proposed Rule Making in response to Elgin FM's Petition. However, Elgin FM's proposal appears to have merit. (Maxagrid would gladly accept a grant on Channel 242A.)

5. Tichenor's Motion suggests the relicensing of stations KLTO and KLTP and the allotment of additional channels to Llano within the context of MM Docket 95-49 *without commencing a new rule-making proceeding and issuing a new notice of proposed rule making*:

"If the Commission determines that by allotting certain available channels all interests can be accommodated, it is unnecessary to issue further notices in a proceeding. Churubusco, Indiana, et al., 5 FCC Rcd 916 (1990). In the present case, [Tichenor] has shown that all interests can and should be resolved in a manner that accommodates all the parties."

Tichenor Motion at 9. Specifically, Tichenor suggests that the FCC assign Channel 242C2 at Menard (assuming no competing applications) and Channel 285C3 at Missouri City to Tichenor, Channel 293A at Llano to Elgin FM, Channel 271A or Channel 275A to BK Radio, Channel 271A or Channel 275A at Llano to Maxagrid, and Channel 285C3 at Marble Falls to Maxagrid.

II. ARGUMENT

6. The fly in Tichenor's ointment is Tichenor's proviso that the Commission implement the global settlement without commencing a new rule making. Churubusco hardly supports such an unprecedented action. Indeed, Churubusco mandates *rejection* of Tichenor's Motion. Other controlling precedent also prohibits adoption of Tichenor's scenario.

7. In the Churubusco proceeding, the Commission allotted alternative channels to accommodate the initial Petitioner's proposal as well as all *timely filed and acceptable*

Counterproposals. In the (First) Memorandum Opinion and Order, 4 FCC Rcd 5045 (M.M. Bur., 1989), the Mass Media Bureau denied a request for reconsideration filed by Huntington Broadcasting Corporation (*HBC*), licensee of station WIOE-FM, Channel 276A, Huntington, Indiana. HBC was unhappy with Channel 275A, the frequency the Report and Order awarded to HBC, because Channel 275A allegedly did not have the upgrade potential of HBC's preferred Channel 286A.

8. Among other things, in addition to substituting Channel 275A for HBC's licensed Channel 276A at Huntington, the Report and Order, 2 FCC Rcd 6505 (M.M. Bur. 1987) (*R & O*), allotted Channel 286A to Roanoke, Indiana. Awarding either a Class A or high-class allotment to HBC/Huntington on Channel 286 would have conflicted with the allotment of Channel 286A to Roanoke. The Bureau rejected HBC's challenge to the outcome promulgated by the *R & O*, precisely because HBC did not advance its plans to upgrade before the close of the initial comment date.

9. In the (Second) Memorandum Opinion and Order, 5 FCC Rcd 916 (1990), the FCC denied HBC's Application for Review, holding that the *R & O* "accommodated all the *timely* expressed interests in this proceeding [emphasis added; footnote omitted]" and that "[t]he Division properly determined that by allotting substitute channels, all timely interests, including HBC's could be accommodated [footnote omitted]." *Id.* at 918, para. 15.

10. Maxagrid has previously demonstrated that, in addition to at least two other fatal flaws, the Joint Counterproposal was also fatally untimely by virtue of its mutual exclusivity with Mr. Henderson's defective, initial Counterproposal, and thus its untimeliness relative to the

NPRM. See Maxagrid's July 30, 1997 Opposition to Petition for Reconsideration (which Maxagrid hereby incorporates by reference), particularly at ¶¶ 5-14. That plurality of defects which afflict the Joint Counterproposal, discussed in this proceeding previously and in detail, both by the FCC and by Maxagrid, preclude consideration of Tichenor's relicensing proposal in this proceeding. Therefore, the Commission must reject Tichenor's Motion, must reject Tichenor's Petition for Reconsideration, and thereby achieve closure in this docket.¹

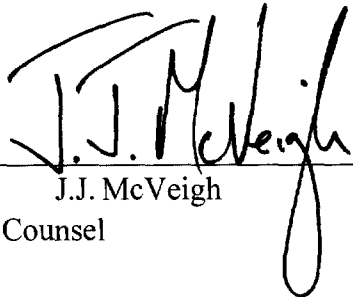
¹For the Commission to entertain Tichenor's Menard proposal in this docket would violate the *Ashbacker* rights (*Ashbacker v. FCC*, 326 U.S. 327 (1945)) of potential champions of allotments: mutually exclusive with Channel 242C2 at Menard; but not mutually exclusive with Channel 242A at Llano. Entertaining Tichenor's Missouri City/Menard Counterproposal would also violate Section 1.420(d) of the Commission's Rules. This the Commission can not do, for "[i]t is a 'well-settled rule that an agency's failure to follow its own regulations is fatal to the deviant action.'" *Florida Institute of Technology v. FCC*, 952 F.2d 549, 553 (D.C. Cir. 1992), *quoting*, *Word of Life Television Network, Inc. v. FCC*, 593 F.2d 1356, 1359 (D.C. Cir. 1979), *quoting*, *Union of Concerned Scientists v. Atomic Energy Commission*, 499 F. 2d 1069, 1082 (D.C. Cir. 1974).

11. Moreover, it bears pointing out, at least in passing, that contrary to Tichenor's suggestion, the Commission also cannot consider Elgin FM's proposal — however meritorious it may be — in this proceeding.²

12. Finally, please note counsel's new address.

Respectfully submitted,

MAXAGRID BROADCASTING CORPORATION

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Date: January 28, 1998

²Indeed, Elgin FM itself has wisely not requested that. Rather, Elgin FM has rightly captioned its Petition contemplating the Commission's assignment of new docket and rule-making numbers. Elgin FM's proposal must be the subject of a new Notice of Proposed Rule Making in a new and separately docketed rule-making proceeding.

CERTIFICATE OF SERVICE

I hereby certify that I have, this Twenty-eighth day of January, 1998, sent copies of the foregoing **OPPOSITION TO MOTION TO STRIKE** by first class United States Mail, postage prepaid, to:

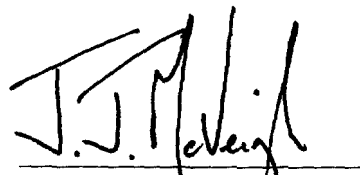
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